IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1951

No. 699

LOY VERNAL IMBODEN,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

1(a) The Government claims that a criminal trial does not automatically follow denial of a claim for deferment as a conscientious objector—stating that the registrant can obey the induction order and thereby avoid criminal proceedings. Counsel for the Government apparently does not truly understand what a conscientious objector is. A sincere conscientious objector is a man who is motivated by such strong beliefs that he will unhesitatingly face martyrdom rather than do any act in violation of those beliefs. A man who claims to be a conscientious objector but who, when that claim is denied, submits to induction and does what he previously said he could not in good conscience do, is a sham—no less. The man who is sin-

cere in his claim will *always* refuse induction and take the consequences—be that acquittal (because he was not given a fair chance to prove his sincerity), imprisonment, or (as has happened in other nations) death.

The very fact that the sincere objector and not the sham is the one most likely to face prosecution is a most compelling reason for requiring our Government to follow fair procedures when dealing with people in petitioner's position.

1(b) The Government claims that the fact that Congress provided a special appeal procedure in conscientious objector cases does not indicate that Congress intended to accord such persons, claiming exemption as conscientious objectors, a right to a trial type of hearing which is not accorded to any other class of registrants. On the contrary, we feel that the very fact that Congress set up a special requirement for inquiry and hearing on appeal in this type of case *and no other* indicates a Congressional intent to handle this class of registrants in a different manner from all other types of registrants.

All appeals other than those involving conscientious objector claims go to the appeal boards solely on the record made up in the local board. There is no new hearing at the appeal level. Also—significantly—at the local board level, no confidential information can be withheld from registrants under the regulations *(Regulation 1606.31, et sec.;* also *Regulation 1623.1).* Thus, as things now stand, *no other type of registrant is faced with a secret file of any sort.*

1(c) Regarding the Government's contention that the evidence from unrevealed informants was not the primary basis used for denying a conscientious objector deferment in this case, we submit that when a report contains im-

proper matter, the burden is on the prosecution to show that the report did not in any way affect the board's decision *(U.S. v Balogh, 157 Fed 2d939, Syl 4)*. The government made no attempt to meet such burden in this case, but, on the contrary, the entire trial was conducted by the trial Court, over our objections, on the theory that it made no difference whether the appeal board did or did not rely, either wholly or partly, on the evidence from unrevealed informants (R96, 105, 140).

1(d) One question constantly recurs to us. What does the Department of Justice feel that it gains by withholding names of informants from registrants in this type of case? Although we contend that registrants are entitled to meet F.B.I. informants face to face, we recognize that even the mere disclosing of names and addresses in advance of hearings would help registrants prepare their presentations at the hearings. A history of ill-feeling between a witness and the registrant might be shown by way of proving that malice motivated the statements of the witness. Or a witness who had gotten excited and confused when being interviewed by the F.B.I. (which frequently happens) could be contacted by the registrant and be asked to send in a statement correcting and explaining his own previous statement.

We can understand why the Department of Justice may not want to reveal the identities of witnesses against people in Government jobs who are suspected of disloyalty (although we sincerely feel that this Court erred dangerously in affirming the *Bailey case, 341 U.S. 918)*. In such a situation, the witnesses may be key spies who have worked their way into the inner circles of subversive groups. Revealing their identities would end their usefulness to the Government.

But here we have no such situation. Individual inform-

ants generally have personal knowledge regarding only one, or a very few registrants. What dire consequences can befall them or the Government if their identities are revealed to registrants? Refusal under such circumstances to even reveal identities, whether permitting cross-examination or not, is certainly a violation of due process of law, and makes a nullity of the directive of Congress *(section 6J of act)* that the investigation and hearing must be "appropriate" (i.e.—fair).

The secret witness type of procedure is too fraught with danger to our fundamental Constitutional rights to be permitted when no compelling reason for secrecy exists.

2. In attacking our claim under question 2, Government counsel assumes we are contending that Congress may not grant or refuse deferment on an arbitrary or capricious basis. It is, of course, true that Congress can not act capriciously, but our contention relates not to caprice but to the Constitution. We contend that Congress can not, in granting an exemption it is not required to grant, transgress Constitutional limits and grant or withhold exemption on any basis which aids one religion over another or which aids all religions as against the non-religionists. In view of the possible unsettling influence of this Court's opinion rendered on April 28, 1952 in #431, October Term 1951, *Zorach, et al v Board of Education* as related to the case of *McCollum v Board of Education 333 U.S. 203,* we believe it is now even more important that this Court review petitioner's case on the merits and let its decision be known—thereby possibly settling the doubts which have been raised in the minds of many people by *the Zorach case.*

CONCLUSION

The problem of the use of secret files and secret wit-

nesses is a growing one. When its use was attempted in Ohio against a public utility in a rate case, such use was promptly and unanimously condemned by this Court in *Ohio Bell Telephone Co. v Public Utilities Commission of Ohio, 301 U.S. 292.* When it was tried against a federal employee, this Court could not muster a majority to decide either way, and affirmed its use by an equally divided Court in *Bailey v Richardson 341 U.S. 918.* Attempts are now being made to use similar devices against public school teachers. Similar attempts in other fields are sure to follow.

It is bad enough to discharge public servants on the basis of information obtained from unknown witnesses, but it is completely beyond Constitutional bounds to directly or indirectly use evidence from secret witnesses to obtain a criminal conviction.

It is inevitable that this Court will be called upon to mark the limits which must be observed in the use of secret files and secret witnesses. The instant case calls for the marking of some of those limits.

A writ of Certiorari should be granted so that this Court can review the case on the merits and make its decision known regarding this growing problem.

Respectfully submitted,
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